

***United States Court of Appeals
for the Second Circuit***



APPENDIX

75-7067
~~74-8395~~

United States Court of Appeals

For the Second Circuit.

HUDSON TIRE MART, INC.,
Plaintiff-Appellant,
against

AETNA CASUALTY AND SURETY COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT—
NORTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

JEROME D. BROWNSTEIN,
Attorney for Plaintiff-Appellant,
53 Third Street,
P. O. Box 839,
Troy, N. Y. 12181
(518) 273-7073

BOUCK, HOLLOWAY & KIERNAN,
Attorneys for Defendant-Appellee,
107 Columbia Street,
Albany, N. Y. 12210
(518) 465-2236.

THE REPORTER COMPANY, INC., Walton, N. Y. 13856—607 865-4131—1975

(5452)



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PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS,
For the Second Circuit.

-X

HUDSON TIRE MART, INC.,

Plaintiff-Appellant,

against

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT--
NORTHERN DISTRICT OF NEW YORK.

-X

RELEVANT DOCKET ENTRIES.

<i>Date</i> 1974	<i>Proceedings</i>
Nov. 25	(1) Filed complaint
Nov. 26	Issued summons-original-1 copy & del;vd to Marshal for service
Nov. 26	(2) Filed Order for hearing on application for preliminary injunction Dec. 2, at Albany, affidavit in support of motion for TRO and preliminary injunction
Nov. 29	(3) Filed plaintiff's brief on motion for pre- liminary injunction
Nov. 29	(4) Filed Affidavit of Francis J. Holloway
Dec. 2	(5) Filed an Order (12/2/74) denying ap- plication for preliminary injunction and dis- missing order to show cause.
Dec. 2	(6) Filed Notice of Appeal
Dec. 2	Application for Preliminary Injunction denied. Order to Show Cause dismissed. Stay granted until Thurs. Dec. 5, 1974
Dec. 2	(7) Filed Order granting stay until Dec. 11, 1974
Dec. 2	(8) Filed Bond on appeal secured by cash de- posit
Dec. 13	(9) Filed summons served 12/5/74 on Aetna Casualty and Surety Company through G. T. Forbes, Sr. Adm. Law Dept.

RELEVANT DOCKET ENTRIES

<i>Date</i> 1974	<i>Proceedings</i>
Dec. 19	(10) Filed designation of papers to be sent to Circuit Court of Appeals
Dec. 23	(11) Filed Notice of Motion returnable Jan. 6, 1975 at Albany, motion for Order dismissing complaint

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SUMMONS.

UNITED STATES DISTRICT,
NORTHERN DISTRICT OF NEW YORK.

SAME TITLE

TO THE ABOVE-NAMED DEFENDANT:

You are hereby summoned and required to serve upon Jerome D. Brownstein, plaintiff's attorney, whose address is P. O. Box 839, 53 Third Street, Troy, New York 12181, an answer to the complaint which is herewith served upon you, within twenty (20) days after service of the summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

DATED: November 25, 1974

CLERK OF COURT

COMPLAINT.

UNITED STATES DISTRICT,
NORTHERN DISTRICT OF NEW YORK.

SAME TITLE

Plaintiff, for its complaint herein, by its attorney,
Jerome D. Brownstein, Esq., alleges:

I. STATEMENT AS TO JURISDICTION

1. This is a civil action seeking declaratory and injunctive relief. Plaintiff seeks a judgment declaring certain provisions in a standard form fire insurance policy mandated by Section 168 subd. 6 of the Insurance Law of the State of New York to be unconstitutional and violative of rights guaranteed to the plaintiff by the Fourteenth Amendment to the Constitution of the United States. Plaintiff also seeks a preliminary and permanent injunction restraining the defendant from attempting to examine the plaintiff and from conducting other discovery procedures pursuant to the aforesaid statute. Jurisdiction is invoked pursuant to 28 U. S. C. Sections 1331, 1343(3), 2201, and 2202 and 42 U. S. C. Section 1983.

2. The amount in controversy in this suit, exclusive of interest and costs, is in excess of \$10,000.

COMPLAINT

II. VENUE

3. Venue is proper pursuant to 28 U. S. C. Section 1391(c).

III. PARTIES

4. Plaintiff, Hudson Tire Mart, Inc., is a domestic corporation duly organized and doing business under the laws of the State of New York.

5. Defendant, Aetna Casualty and Surety Company, on information and belief, is authorized to conduct general insurance business under the laws of the State of New York, and maintains its principal offices at Hartford, Connecticut.

IV. FACTUAL ALLEGATIONS

6. On or about November 1, 1973, the defendant issued to the plaintiff a fire policy number 10FP801463FCA, effective on that date for a period of one year insuring the premises of Hudson Tire Mart, Inc., and located at 60 Fairview Avenue, Hudson, Columbia County, New York.

7. The aforesaid policy of insurance, provided among other things, defendant Aetna Casualty and Surety Company would indemnify the plaintiff against loss occasioned by fire to the premises and further, provided, in accordance with the standard form fire insurance policy mandated by Section 168(6) of the Insurance Law of the State of New York as follows: "The insured, as

COMPLAINT

often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described and submit to examination under oath by any person named by this Company, and subscribe the same; and as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made." A true copy of said insurance policy is annexed hereto as Exhibit A and made a part thereof by reference.

8. On or about May 29, 1974, the premises owned by the plaintiff and located at 60 Fairview Avenue, Hudson, Columbia County, New York, sustained losses and damages occasioned by fire. Upon information and belief, Paul Di Stefano, a minority stockholder and officer of the plaintiff, Hudson Tire Mart, Inc., was indicted by the September, 1974 term of the Columbia County Grand Jury in violation of Section 150.10(1) of the Penal Law of the State of New York, to wit: Arson in the third degree, in regard to the fire that occurred on May 29, 1974 at the premises of the plaintiff. Immediately thereafter, the plaintiff received a notice from Aetna Casualty and Surety Company to examine the plaintiff

COMPLAINT

by Paul Di Stefano. A true copy of this notice is marked Exhibit B and annexed thereto and made part hereof by reference. That hereafter, the examination date was adjourned to the 15th day of November, 1974.

9. Thereafter, the defendant agreed that the defendant would not serve notice on the insured to be examined by the specific agent until it had first examined the insured by an agent to be named by the insured. A stipulation to that effect is annexed hereto as Exhibit C.

10. Defendant and plaintiff have now agreed that plaintiff would appear for examination under oath on the 2nd day of December, 1974, reserving all rights to both parties to take any other actions they feel appropriate.

V. CAUSE OF ACTION

11. The provision quoted in paragraph 7 of this complaint [hereinafter referred to as the "Cooperation Clause"] and mandated by Section 168(6) of the Insurance Law of the State of New York is violative of the constitutional rights of the plaintiff in that it operates to deprive the plaintiff of property without due process of law in contradiction to Amendment 14 to the Constitution of the United States.

COMPLAINT

12. The Cooperation Clause provides for the unlimited use of disclosure devices by an insurer without limitation and solely in the discretion of the insurer. There is no provision made for application to the Courts for protective orders and other judicial safeguards.

13. The Cooperation Clause has been construed by the Courts of the State of New York strictly in that the insured under fire insurance policies have been denied the right to sue to recover upon contracts of insurance because they have failed to appear for examinations requested by insurers under difficult circumstances.

14. Furthermore, the Cooperation Clause is unconstitutionally vague in that it provides no standards by which an insured can determine whether his refusal to provide certain requested documents, or appear for examinations, is a reasonable refusal and a justified violation of the Cooperation Clause of the standard form contract.

15. Accordingly, unless and until the relief demanded in this complaint is granted, plaintiff has good reason to believe that its right to recover under its contract of insurance will be threatened, impeded, and otherwise denied by the insured, and the plaintiff, by reason of the aforesaid, will suffer serious, immediate and irreparable injury.

COMPLAINT

16. Plaintiff has no adequate remedy at law.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court:

1. Issue a declaratory judgment declaring that the Cooperation Clause mandated by Section 168(6) of the Insurance Law of the State of New York is violative of the Fourteenth Amendment to the Constitution of the United States, and

2. Permanently enjoins and restrains the defendant, its agents, assistants, successors, employees, attorneys, and all persons acting in concert or cooperation with them or at their direction from examining the insured, its agents or from requesting any other disclosure devices pursuant to the provisions of the standard form fire insurance policy, and

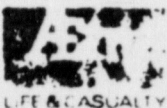
3. Preliminarily enjoins and restrains the defendants, its agents, assistants, employees, attorneys and all persons acting in concert or cooperation with them from attempting to examine the plaintiff, or its agents, or otherwise attempting to utilize disclosure devices provided for in the standard fire insurance policy pending determination of the issues raised in this lawsuit and,

COMPLAINT

4. Allows plaintiff such other relief as appears to the Court to be necessary, equitable or just.

JEROME D. BROWNSTEIN, ESQ.
Attorney for Plaintiff
53 Third Street, P. O. Box 839
Troy, New York 12181

(Verified by Jerome D. Brownstein, November 25, 1974.)



FIRE POLICY

- ☒ **THE AETNA CASUALTY AND SURETY COMPANY**
Hartford, Connecticut 06115. A Stock Insurance Company
- ☐ **THE STANDARD FIRE INSURANCE COMPANY**
Hartford, Connecticut 06115. A Stock Insurance Company

Policy Term Expiration Date
1 Year(s) 10 FP 041375
Policy Period
11-1-73 11-1-74

It is important that the warranties on all policies covering the same property read exactly alike. If they do not, they should be made uniform at once.

Only those coverages indicated below by a premium charge are provided. Additional coverages are available only when endorsed hereon or added hereto.

Amount	Rate	Prepaid Term Premium Due At Inception	Annual Payment Due Under Def. Prem. Pay. Plan	PERIL(S) Insured Against and Coverage(s) (Provide: Insert Name of Each)
\$ 100,000.		\$	\$	Fire and Lightning
		\$	\$	Extended Coverage
		\$	\$	
		\$	\$	
		Total(s) \$	\$	

DESCRIPTION AND LOCATION OF PROPERTY COVERED

(Show construction, type of roof and occupancy of building(s) covered or containing the property covered. If occupied as a dwelling state number of families

Item No.	Amount Fire or Fire and Extended Coverage, or Other Peril	Per Cent of Co Insurance Applicable
----------	---	-------------------------------------

ON ALL CONTENTS USUAL TO A TIRE DEALER LOCATED IN CONCRETE BLOCK
BUILDING SITUATE 60 FAIRVIEW AVE., HUDSON, NY

Subject to Form No(s) attached hereto _____ (date(s) _____)

6910(1-69) 821(10-72) 881(2-71)

Mortgage Clause Subject to the terms, conditions and covenants of the mortgage clause attached hereto, loss, if any, on building items, shall be payable to the mortgagee.

Correspondence Date 11-9-73

Agency of

AGENT

IN CONSIDERATION OF THE PROVISIONS AND STIPULATIONS HEREIN OR ADDED HERETO

[illegible][illegible]

EXHIBIT A, ANNEXED TO COMPLAINT

Uninsurable and excepted property. This policy shall not cover accounts, bills, securities, deeds, evidences of debt, money or other property, unless specifically named herein in writing, bullion or manuscripts. This Company shall not be liable for loss by fire or other perils insured against in this policy caused directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces, or by an actual or an immediately impending war; (b) insurrection; (c) usurped power; (d) rebellion; (e) destruction at the time of fire; (f) spread of fire provided the insured is insured against the perils excluded by this policy. The insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises. (g) nor shall this Company be liable for loss by theft. Other Insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto. Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring: (a) while the hazard is increased by any means within the control or knowledge of the insured; (b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; (c) unless fire ensues, and in that case, the loss shall be limited to the actual cash value. Other perils or subjects. Any other perils to be insured against or subjects of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto. Added provisions. The extent of the application of insurance under this policy and of the contribution to the contribution in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change. Waiver. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted in writing or expressed in writing. Added hereto. No provision of limitation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein. Cancellation. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand. Mortgagee. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation. If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability exists as to the mortgagee or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue, or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions. In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at the agency hereinbefore mentioned.

Requirements in case loss occurs. The insured shall, upon immediate written notice to this Company of any loss, the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and extent of the loss, the interest in the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereon, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same, and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made. Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item, and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally. Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required. Abandonment. There can be no abandonment to this Company of any property. When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided. Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss. Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

STATE MAINE: The words "five days" in line 62 are changed to "ten days".
 NORTH CAROLINA: The words "twelve months" in line 161 are changed to "ten years".
 WISCONSIN: The words "five days" in line 62 are changed to "ten days".

Howard A. Moore
 Secretary

Page 2

Donald M. Johnson
 President

EXHIBIT B, ANNEXED TO COMPLAINT--NOTICE.

In the Matter

of

The examination of HUDSON TIRE MART, INC.

under a certain policy of insurance

No. 10 FP 801463 FCA of THE AETNA CASUALTY
AND SURETY COMPANY.

TO: HUDSON TIRE MART, INC.
60 Fairview Avenue
Hudson, New York

PLEASE TAKE NOTICE that, pursuant to the provisions of Policy No. 10 FP 801463 FCA of The Aetna Casualty and Surety Company providing insurance against loss by fire as therein set forth, on contents located in a building at 60 Fairview Avenue, Hudson, New York,

YOU ARE HEREBY NOTIFIED that you are required to appear by PAUL DISTEFANO at the Supreme Court Library, Second Floor, Columbia County Courthouse, Hudson, New York, on the 21st day of October, 1974, at 1:30 P. M., to be examined under oath before Francis J. Holloway, Esq., on all matters relating to the alleged loss or damage by fire to the contents above described, allegedly occurring on May 29, 1974, and

TAKE FURTHER NOTICE that you are required to produce at such examination all books of account, bills, invoices,

EXHIBIT B, ANNEXED TO COMPLAINT

bills of sale, income tax statements, statements of profit and loss, balance sheets and other vouchers and documents, or copies thereof if the originals be unavailable, as to all property concerning which such alleged loss is claimed.

Dated: October 11, 1974.

THE AETNA CASUALTY AND SURETY
COMPANY

Bouck, Holloway and Kiernan
By BOUCK, HOLLOWAY AND KIERNAN
its Attorneys

Office & P. O. Address
107 Columbia Street
Albany, New York 12210
(518) 465-2236

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cc: Ralph C. Pape, Esq.
Church Street
Coeymans, New York 12045

EXHIBIT C, ANNEXED TO COMPLAINT--STIPULATION.

STATE OF NEW YORK
SUPREME COURT

COLUMBIA COUNTY

HUDSON TIRE MART, INC.,

Plaintiff,

-against-

STIPULATION

AETNA CASUALTY & SURETY COMPANY
and PAUL DI STEFANO,

Defendants.

IT IS HEREBY STIPULATED by and between Jerome D. Brownstein, attorney for the plaintiff and Bouck, Holloway and Kiernan, attorneys for the defendant Aetna Casualty & Surety Company that certain notices of examination under oath dated October 11, 1974 and November 4, 1974 served on behalf of Aetna Casualty & Surety Company be and they are hereby withdrawn, with the specific reservation to the plaintiff of its position that the defendant Aetna Casualty & Surety Company may not specify in the notice of examination under oath the individual to be examined, and with a specific reservation of the position of Aetna Casualty & Surety Company that it may specify in the notice of examination under oath the person to be examined, and it is further

STIPULATED that a certain order granted by Honorable John T. Casey, Justice of the Supreme Court, on the 13th day of November, 1974 may be vacated by the Court upon the within

EXHIBIT C, ANNEXED TO COMPLAINT

Stipulation, with such order of vacatur to contain a provision reserving to each of the parties hereto its position as herein set forth, and also providing that the withdrawal of the notices of examination under oath is without prejudice to the right of Aetna Casualty & Surety Company to again serve notices of examination to examine the named insured in the first instance under oath with respect to the fire of May 29, 1974.

November , 1974

BOUCK, HOLLOWAY & KIERNAN
Attorneys for Defendant
Aetna Casualty & Surety
Company

JEROME D. BROWNSTEIN
Attorney for Plaintiff

ORDER ON APPLICATION FOR PRELIMINARY INJUNCTION.

UNITED STATES DISTRICT NORTHERN DISTRICT OF NEW YORK

HUDSON TIRE MART, INC.,

Plaintiff,

-against-

AETNA CASUALTY AND SURETY COMPANY,

Defendant.

ORDER

Civil Action No.

74 CV 493

Upon the verified complaint attached hereto and upon the annexed affidavit of Jerome D. Brownstein, Esq., sworn to the 25th day of November, 1974, it is

ORDERED, that the application for a preliminary injunction prayed for in the complaint be and the same hereby is set for hearing before the undersigned in *Albany*, New York, on the *2nd* day of *December*, 1974, at *9.30* o'clock in the United States District Courtroom, in said City; and

It appearing that the defendant is about to commit the acts hereinafter specified and that he will do so unless restrained by order of this Court, and that immediate and irreparable injury, loss or damage will result to plaintiff before the motion for issuance of a preliminary injunction can be heard, it is further

ORDERED, that defendant Aetna Casualty and Surety Company, its agents, servants, employees and attorneys and all persons in active concert and participation with it be and they

11/26/74
Paragraphs
Stricken after
hearing at 9:30
Brownstein &
Shalloway in
Chambers -
Matter to be
heard 9:30 AM.
Monday 12/2
James T. Foley
USDJ

ORDER ON APPLICATION FOR PRELIMINARY INJUNCTION

hereby are restrained ~~from examining the plaintiff under oath pursuant to the terms and conditions of the contract of insurance; issued by the defendant to the plaintiff;~~ and it is further

ORDERED, ~~that this order expire upon the hearing of the motion for a preliminary injunction or within ten days after entry unless within such time the order for good cause shown shall be extended for an additional period, or unless the defendant consents that it may be extended for a longer period;~~ and it is further

ORDERED, that service of this order together with a copy of the papers hereto attached and the summons and complaint in this action on the defendant Aetna Casualty and Surety Company and upon the attorneys for the defendant, Bouck, Holloway and Kiernan, by a person over the age of 18 not a party to this action on or before *November 27, 1974*, be deemed sufficient service.

Issued at Albany, New York on the *26* day of *December* 1974.

15/ James T. Foley
United States District Judge

AFFIDAVIT OF JEROME D. BROWNSTEIN IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION.

UNITED STATES DISTRICT NORTHERN DISTRICT OF NEW YORK

HUDSON TIRE MART, INC.,

Plaintiff,

-against-

AETNA CASUALTY AND SURETY COMPANY,

Defendant.

AFFIDAVIT IN
SUPPORT OF
MOTION FOR
TEMPORARY RE-
STRAINING ORDER
AND PRELIMIN-
ARY INJUNCTION

STATE OF NEW YORK)
)SS.:
COUNTY OF RENSSELAER)

JEROME D. BROWNSTEIN, ESQ., being duly sworn, deposes
and Says:

1. He is the attorney for the plaintiff in the above
entitled action and is fully familiar with the facts and circum-
stances giving rise to this action from conversations he has had
with agents of the plaintiff.

2. This is an action for declaratory and injunctive
relief as more fully appears in the verified complaint herein.

3. Plaintiff and defendant agreed orally in a telephone
conversation held on or about the 10th day of November, 1974
that plaintiff would appear for examination under oath before
Bouck, Holloway and Kiernan, attorneys, and agents for the de-
fendant insured on December 2, 1974. Both parties reserved their
rights to take whatever action they feel is required under the
circumstances.

4. Unless defendant is enjoined and restrained during
the pendency of this action from examining the plaintiff and its

AFFIDAVIT OF JEROME D. BROWNSTEIN IN SUPPORT OF
MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

agents and from conducting further discovery proceedings pursuant to Section 168(6) of the Insurance Law of the State of New York and pursuant to the provisions of a contract of insurance issued by the defendant to the plaintiff, the plaintiff will suffer great and irreparable damage, in that its rights to recover under the said policy of insurance will be jeopardized and plaintiff will be deprived of property without due process of law.

5. This application for a temporary restraining order pending the determination of the motion for a preliminary injunction is made to the Court on 24 hours written notice to Bouck, Holloway and Kiernan, attorneys and agents for the defendant. A copy of the notice with affidavit of service is annexed hereto as Exhibit A.

6. Deponent respectfully submits that no harm or prejudice will result to the defendant's position if a temporary restraining order is granted because plaintiff has already supplied the defendant and its agents with an inventory and appraisal by Nacey Associates, Inc., for damages claimed and has exhibited to the agents of Aetna all that remains is the insured's property and has submitted to informal examinations required by representatives of the insured. This restraint hereby preserves the status quo.

Jerome D. Brownstein
JEROME D. BROWNSTEIN

Sworn to before me this

25th day of November, 1974

Notary Public

A-19
GALE WITTMANN (G.W.O.)
Notary Public in the State of New York
Residing in Rochester, New York

EXHIBIT A, ANNEXED TO AFFIDAVIT OF JEROME D.
BROWNSTEIN--NOTICE OF APPLICATION FOR
TEMPORARY RESTRAINING ORDER.

LAW OFFICES

JEROME D. BROWNSTEIN

TROY, NEW YORK 12181

FIFTY-THREE THIRD STREET

P. O. BOX 830

TELEPHONE 273-7073

AREA CODE 518

November 25, 1974

Re: Hudson Tire Mart vs. Aetna-our file 849-900

Attention: Francis J. Holloway, Esq.

Dear Counselor:

Please take notice that the plaintiff Hudson Tire Mart Inc. will apply for a temporary restraining order pending a determination upon its application for a preliminary injunction in the course of an action for a permanent injunction restraining defendant from proceeding to an examination under the policy of the plaintiff Hudson Tire Mart Inc.

This application will be made before Hon. James T. Foley at his chambers in the Fourth Floor of the Federal Building and U.S. Post Office in the City of Albany, New York at 2:00 p.m. on November 26, 1974 upon the papers enclosed herewith, to wit: The affidavit and order to show cause, summons and complaint. This notice is given in compliance with the 24 hour notice requirement and at the direction of Hon. James T. Foley.

Cordially,

Jerome D. Brownstein

To: Bouck, Holloway & Kiernan
107 Columbia Street
Albany, New York 12210

JDB:gg

AFFIDAVIT OF FRANCIS J. HOLLOWAY IN OPPOSITION
TO MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HUDSON TIRE MART, INC.,

Plaintiff,

AFFIDAVIT

-against-

AETNA CASUALTY AND SURETY COMPANY,

Defendant.

STATE OF NEW YORK)

: ss.:

COUNTY OF ALBANY)

FRANCIS J. HOLLOWAY, being duly sworn, deposes and
says:

Deponent is an attorney-at-law, a member of the firm
of Bouck, Holloway and Kiernan, the attorneys representing the
defendant in the above entitled action. This affidavit is sub-
mitted in opposition to the application of the plaintiff for a
preliminary injunction restraining an examination under oath of
the plaintiff pursuant to the terms and conditions of the policy
of insurance issued by the defendant to the plaintiff.

Deponent caused to be served a notice of examination
under oath dated October 11, 1974, a copy of which is attached to
the complaint in the within action. The notice was addressed to

AFFIDAVIT OF FRANCIS J. HOLLOWAY IN OPPOSITION
TO MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION

the insured, Hudson Tire Mart, Inc., and required the appearance of one Paul Di Stefano for examination. Deponent has been advised by Ralph Pape, Esq., the attorney for Hudson Tire Mart, Inc., that Paul Di Stefano was the owner of 49% of the common stock of the corporation, that he was acting as manager of the business at the location where the fire occurred, and that he was a director of the corporation. As set forth in the complaint herein, Mr. Di Stefano is now under indictment with respect to arson in the third degree with respect to the fire in question.

A claim has been asserted against the defendant in the sum of One Hundred Thousand Dollars (\$100,000.00). This claim is in the form of a thirty-five page listing with respect to tires, supplies and parts, and equipment, of an alleged value of One Hundred Seven Thousand Four Hundred Nine Dollars and Eight-Three Cents (\$107,409.83). Among other things, it is contended that there were three hundred tires "burned out of sight" of a value of Twelve Thousand Five Hundred Thirty-Four Dollars (\$12,534.00).

This is precisely the type of case in which it is essential that the insurance company conduct an examination under oath with respect to the origin of the fire and the amount of loss and damage which is being claimed.

The present application is the third attempt at frus-

AFFIDAVIT OF FRANCIS J. HOLLOWAY IN OPPOSITION
TO MOTION FOR TEMPORARY RESTRAINING ORDER
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trating the examination under oath. The first attempt was in an action by Paul Di Stefano against the defendant in Supreme Court, Columbia County, in which a temporary restraining order was issued preventing the examination under oath. The order to show cause in that action, dated October 21, 1974, granted by Hon. Edward S. Conway, which contained the restraining provision, was vacated by Judge Conway on November 1, 1974, and the action by Mr. Di Stefano seeking declaratory judgment relief was dismissed.

The plaintiff in this action then commenced a suit in Supreme Court, Columbia County for declaratory judgment seeking a vacator of the notice of examination under oath. A preliminary restraining order was issued by Hon. John T. Casey on November 13, 1974. Deponent appeared before Judge Casey on November 15, 1974 and requested that the restraining order be vacated. The Court indicated that it would vacate the restraining order if the notice of examination under oath were modified so as to delete the specific requirement for the production of Paul Di Stefano, and if the matter were left in a posture where the notice of examination under oath specified that the defendant was examining Hudson Tire Mart, Inc. By stipulation, which is a part of the papers herein, the plaintiff and defendant, each reserving its positions, stipulated to a vacation of the order. There was also a stipulation discon-

AFFIDAVIT OF FRANCIS J. HOLLOWAY IN OPPOSITION
TO MOTION FOR TEMPORARY RESTRAINING ORDER
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tinuing the action in Supreme Court, Columbia County brought by the plaintiff against the defendant. An order was signed by Judge Casey on November 20, 1974, vacating the restraining order and the entire order to show cause.

Based upon the cases set forth in the memorandum of law to be submitted herewith, it clearly appears that the plaintiff is not entitled to the relief sought and the present application is simply another in a series of legal maneuvers to frustrate the defendant's right of examination under oath--a right granted by Section 168 of the New York Insurance Law and a requirement set forth in the policy of insurance issued to the plaintiff by the defendant. Unless it has something to conceal from the defendant, there is absolutely no reason why the plaintiff should not be willing to submit to an examination under oath and disclose the relevant and material circumstances regarding the origin of the fire and the amount of loss and damage allegedly sustained. If the insured does have something to conceal from the defendant with respect to the origin of the fire or its claim as to the amount of the loss, then one can understand the plaintiff's attempts to prevent an examination under oath.

It is respectfully submitted that the application should be denied in its entirety and that the examination under

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AFFIDAVIT OF FRANCIS J. HOLLOWAY IN OPPOSITION
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oath scheduled for December 2, 1974, at 2:00 P.M. should proceed.

S/ Francis J. Holloway

Francis J. Holloway

Sworn to before me this 27th
day of November, 1974.

S/Mary E. Humphrey

MARY E. HUMPHREY
Notary Public, State of New York
Residing in Albany County
Commission Expires August 29, 1977

K. HOLLOWAY
KIERNAN
NEYS AT LAW
LUMDIA STREET
NY, N. Y. 12210

MEMORANDUM-DECISION OF FOLEY, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

U. S. DISTRICT COURT
N. D. OF N. Y.
FILED
DEC 2 1974

-----x
HUDSON TIRE MART, INC.,

Plaintiff,

- against -

AETNA CASUALTY AND SURETY COMPANY,

Defendant.
-----x

AT 10:00 O'CLOCK M.
J. R. SCHILLY, Clerk
ALBANY

74-Cv-493

APPEARANCES:

JEROME D. BROWNSTEIN, ESQ.
Attorney and Counsellor at Law,
53 Third Street,
Troy, New York.

Appearing for Plaintiff

BOUCK, HOLLOWAY & KIERNAN, ESQS.,
Attorneys and Counsellors at Law,
107 Columbia Street,
Albany, New York.

By: Francis Holloway, Esq.
Appearing for Defendant.

MEMORANDUM - DECISION

FOLEY: J.

I am going to keep the application as it is within the request for a preliminary injunction, and I have read the writings of the Second Circuit Court which I have written out on

MEMORANDUM-DECISION OF FOLEY, J.

yellow sheets, went over your briefs and gave them time and consideration and as I indicated, I am frank to say, to Mr. Brownstein when I first talked to him about his application being made that it was difficult for me to see any due process violation.

I am going to read into the record, because time is of great importance here, my memorandum decision and order, and our Court Reporter will have to get it out as soon as he can.

The plaintiff company -- and maybe you people, the attorneys, can write down the points that you think important ---

MR. HOLLOWAY: Yes, sir.

THE COURT: The plaintiff in seeking preliminary injunctive relief assumes the burden of showing probable success on the merits and some irreparable injury, or, where the showing of probable success is uncertain, that the balance of hardships tips decidedly in their favor. That is *Clairol Corporation v. Gillette Co.*, 389 F.2d, 264, (2nd Circuit 1968); *Checker Motors Corp. v. Chrysler Corp.*, 405 F.2d 319, 323 (2nd Circuit 1969).

Now here are my own thoughts about the application.

Upon my consideration of the application filed Tuesday, November 26th, 1974, a reading of the complaint and the briefs filed by the attorneys, it is my judgment that the plaintiff failed to meet those requirements of likelihood of success and irreparable harm. From my appraisal of likelihood of success in the declaration sought, that is that Section 168(6)

MEMORANDUM-DECISION OF FOLEY, J.

of the New York Insurance Law, the Cooperation Clause is unconstitutional, is not only uncertain, but most unlikely. The presence of State action necessary under the rulings of the Court of Appeals, Second Circuit, in *Bond v. Dentzer*, 494 F.2d 302 (2nd Circuit 1974) Cert. Den. 43 United States Law Week 3209; *Shirley v. State National Bank*, 493 F.2d 739, (2nd Circuit 1974) in this situation in this action involving private contract with benefits to both sides, obvious to me from immediate questioning is very doubtful. That success leaves the presence of such action under the rulings of the Court of Appeals that I just gave in this situation involving private contract with benefits to both sides, obvious to me from immediate questioning very doubtful.

Further it is difficult for me to find due process violation likely under the settled concept that due process means the right to be accorded adequate hearing at a meaningful time and in a meaningful manner. Due process is not a rigid formula or simple rule of thumb to be applied undeviatingly to any set of facts. That is a Second Circuit case, *Hagopian v. Knowlton*, 470 F.2d 201, at Page 207 (2nd Circuit 1972.) It is also impossible for me to ascertain irreparable harm in the true sense of that phrase. Questioning, of course, at any time is best countered always by truthful and cooperative answers. Insurance companies have that right. I cite now *Kisting v. Westchester*

MEMORANDUM-DECISION OF FOLEY, J.

Fire Insurance Company, 290 F. Supp. 141, (Western District of Wisconsin, 1968) affirmed 416 F.2d 967 (7th Circuit 1969). Also I cite Orozco v. State Farm Mutual Automobile Insurance Company, 360 F. Supp. 223, (Southern District of Florida 1972); affirmed at 480 F.2d 953, (5th Circuit 1973.) There is other writings in the questioning that is sought here. It is always explainable at another time if pre-trial or trial procedures take place in court. This questioning under the contract when applied, in my judgment, in no way can prevent the institution of the suit of the plaintiff corporation for its alleged monetary fire loss. When the right to sue for money damages is available, there is no harm that can be considered irreparable. The fact must be faced that if and when the plaintiff company chooses to sue on the insurance policy it will face in the state or federal court system liberal pre-trial depositions and discovery procedures.

It is important to my mind to note that questions and answers, oral or written, are a customary and usual feature of every insurance contract, - life, health, automobile, disability and soforth. In that regard I cite Herron v. Millers National Insurance Company, 185 F. Supp. at Page 851, 854 (District of Oregon) and Mier v. Niagara Fire Insurance Company, 205 F. Supp. 108, 110 (Western District of Louisiana, 1972).

MEMORANDUM-DECISION OF FOLEY, J.

So that is my conclusion. And I state from the reading of the complaint, supplemented by the briefs, that I do not see likely any deprivation that can be shown of a personal or property right of this plaintiff company that violates due process.

The application for a preliminary injunction is denied and the order to show cause is dismissed, and I will so endorse the order to show cause.

Now because of the seriousness to Mr. Brownstein, and as I say he presented his side well, I am going to allow a stay of a few days so that he can apply to the Court of Appeals, Second Circuit, if he sees fit, because from my knowledge a denial of the preliminary injunction is appealable under F.R.App. Proc. 8, a stay of this order of denial is granted to Thursday, December 5, 1974, to give this plaintiff an opportunity to file an appeal if he sees fit and to apply there for further stay.

The examination of the plaintiff that is scheduled for today, under this notice, at two p.m. is stayed until Monday, December 9th, 1974, at two p.m. under the terms and at the place designated in the notice of examination.

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MEMORANDUM-DECISION OF FOLEY, J.

NOTE

(The lawyers thereafter agreed the stay of the denial
may be effective until Wednesday, December 11, 1974.)

Albany, N. Y.
December 2nd, 1974.

ORDER APPEALED FROM

U. S. DISTRICT COURT

N. D. OF N. Y.

FILED

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HUDSON TIRE MART, INC.,

AT 10 O'CLOCK M.
J. R. SCULLY, Clerk
ALBANY

Plaintiff,

-against-

AETNA CASUALTY & SURETY COMPANY,

ORDER
Civil Case No.
74CV493

Defendant.

PRESENT: Hon. James T. Foley, United States District Judge

Upon the verified complaint and summons and upon the affidavit of Jerome D. Brownstein, Esq. submitted requesting a preliminary injunction, and upon the opposing affidavit of Francis J. Holloway, Esq. and upon all the papers and proceedings herein filed, and after oral argument before the Court on December 2, 1974 and hearing Jerome D. Brownstein, Esq. for the plaintiff and Francis J. Holloway, Esq. for the defendant, the application for a preliminary injunction is denied with dismissal. The memorandum decision of the Court was read into the record, and it was further

ORDERED that a stay herein is granted until December 11, 1974 to allow an appeal of the Court's decision under Federal Rules of Appellate Procedure 8. The order to show cause herein is dismissed.

It is so ordered.

DATED: At Albany, New York
this 2nd day of December, 1974

17/ James T. Foley
JAMES T. FOLEY, United
States District Judge

NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK

HUDSON TIRE MART, INC.,

Plaintiff,

-against-

AETNA CASUALTY & SURETY COMPANY,

Defendant.

NOTICE OF
APPEAL
Civil Action
#74CV493

NOTICE IS HEREBY GIVEN that Hudson Tire Mart, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order of the Hon. James T. Foley, United States District Judge, entered in this action on the 2nd day of December, 1974.

DATED: December 2, 1974

Jerome D. Brownstein

JEROME D. BROWNSTEIN, ESQ.

Attorney for Plaintiff

53 Third Street, P.O. Box 839

Troy, New York 12181

(518) 273-7073

120274

849-900

STATE OF NEW YORK)
) SS.:
COUNTY OF RENSSELAER)

MARILYN R. LABANOWSKI, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Troy, New York. On January 14, 1975, deponent served two (2) copies of the Brief on Appeal for the Plaintiff-Appellant and one (1) copy of the Joint Appendix on Appeal upon Bouck, Holloway and Kiernan attorneys for the defendant-appellee in this action, at 107 Columbia Street, Albany, New York, the address designated by said attorney for that purpose by depositing true copies of the same, enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and control of the United States Post Office within the State of New York.

Marilyn R. Labanowski
MARILYN R. LABANOWSKI

Sworn to before me this
14th day of January, 1975

Jerome D. Brownstein
Notary Public